

capacity to other entities on a non-discriminatory basis. In February, 2001, MnDOT and the Minnesota Department of Administration terminated the agreement with ICS/UCN to build the fiber-optic network because the consortium could not garner sufficient financing to complete installation along the remaining 2,200 miles. After reviewing its options, the state decided that it was not practical to further amend the contract. To date, private sector investment in the project exceeds \$30 million in fiber-optic cable and conduit. The network currently spans 230 miles along 1-94 from the Twin Cities to Moorhead. An additional 20-mile segment will soon be operational along 1-94 from the Metro Area east to the Wisconsin border. Most of the network is comprised of two 2-inch PVC conduits. One PVC conduit is empty, the other contains 192 fibers in an .8-inch cable. In the Twin Cities metro area the number of conduits may vary

Wireless: Towers have not been installed on any trunk highway right-of-way. Currently, MnDOT is planning and evaluating whether to go forward with an RFP for Wireless Communication. No decision has been made to date.

OHIO

FHWA Contact: Richard Henry (614) 280 -6842, E-Mail: Richard.Henry@fhwa.dot.gov

ODOT Contact: Steven D. Cheek (614) 466-3877.

Fiber Optics: No private fiber-optic lines have been installed longitudinally in Ohio. There have been transverse (crossings) installations. There are also a few municipal or MPO longitudinal installations for ITS purposes in some of the major metropolitan areas. ODOT is reassessing its past position on this issue and is currently waiting to the experience of other states programs.

Wireless: There have been tower installations on both Interstate and Limited Access Urban Freeways. 29 towers have been approved (23 on Interstate and 3 on Urban Freeways) There is also 3 installations on ODOT District property. Each provider must enter into a Statewide Master License Agreement and an individual Site Agreement for each site. The license fee is based on a schedule and ranges in price from \$9,200 to \$25,250 per year with periodic adjustments of 3.5% per year for each site depending on the site location (Urban, Suburban, Rural Suburban, or Rural) and the number of antennae on the tower. In addition, a \$10,000 security deposit is required for each installation until the aggregate of the deposits equals \$100,000 for an individual carrier. Each carrier must make space available for co-locator carriers and pay ODOT half the fee or half of the scheduled fee which ever is greater. and provide a space for the State Multi Agency Radio Communications System (MARCS) and other ITS applications at no charge.

WISCONSIN

FHWA Contact: Roger Szudera (608) 829-7508 E-Mail: Roger.Szudera@fhwa.dot.gov

WisDOT Contact: Robert Fasick (608) 266-3438 / (608) 267-7856(fax); robert.fasick@dot.state.wi.us

Fiber **Optics**: -WisDOT may receive compensation in fiber, cash, or both for long. installations on controlled-access freeways and expressways. Access to other state highways is free.

Wireless: No wireless accommodation to date, but companies have indicated interest. WisDOT would allow installations at rest areas, weigh scales, or another safe R/W location for a tower. NOTE: For fiber and wireless, a master agreement is prepared and permits issued for each location.

IOWA

FHWA Contact: Gerry Kennedy, (515) 233-7317 E-mail: Gerald.Kennedy@fhwa.dot.gov

Iowa DOT: Larry Heinz (515) 239-1373 lheintz@max.state.ia.us

Dave Widick (515/) 233-7903 dwidick@max.state.ia.us

Fiber **Optics**: Lines have been installed on Interstate highway R/W in Iowa and also on other controlled access Federal-aid highway R/W in the State. These fiber-optic lines comprise the Iowa Communications Network (ICS) system and other underground communications lines. The ICS system is State owned and operated for State of Iowa business only; therefore, the State has access to the R/W as needed at no cost. Other underground communications systems pay a yearly rental fee, and these facilities have been located as close to the R/W line as possible. Facilities on freeways will be accessed from adjacent lands outside the RIW. Facilities on non-freeways can be accessed from within the R/W. The Division Office has approved longitudinal occupancy.

Wireless: Facilities have not been installed on any Interstate highway R/W in Iowa or on any other

controlled access Federal-aid highway R/W in the State. The Division Office has been involved in talks with IDOT about the possibility of facilities in the future, but has neither encouraged nor discouraged at this time.

KANSAS

FHWA Contact: Jason Cowin (785) 267-7284 E-Mail: Jason.Cowin@fhwa.dot.gov

KDOT Contact: Matt Volz, ITS Coordinator, (785) 296-6356, mattv@ksdot.org

Fiber Optics: Lines are currently being installed as part of two KDOT shared resources contracts with Digital Teleport, Inc. (DTI). The first contract, covering 147 miles, was awarded for the Kansas City metropolitan area in conjunction with an on-going ITS design project (Kansas City Scout) and a Missouri DOT fiber optic shared resources project with DTI on the Missouri side of the project area. The second contract, covering 550 miles, was awarded for a statewide system along I-35, I-70, I-435, I-635, US-69, US-169, K-10, and K-7. Both contracts were awarded in response to a KDOT RFP and are intended to provide the fiber-optic backbone for KDOT's ITS infrastructure. Each contract is approximately 90-95% complete. Prior to these shared resources contracts with DTI, fiber optics lines had only been installed on one section of Interstate R/W in Kansas, a 25-mile section maintained by the Kansas Turnpike Authority (KTA). Wireless: Facilities have not yet been installed on Interstate R/W or any other controlled access Federal-aid highway R/W in Kansas. KDOT invited a wireless vendor in to explain the issues involved with wireless towers on State R/W, but has not yet taken action in this area.

MISSOURI

FHWA Contact: Bob Thomas, (573) 636-7104 E-Mail: Robert.Thomas@fhwa.dot.gov

MoDOT Contact: James R. Zeiger (573) 522-5994

Fiber Optics: Lines have been installed on Interstate highway R/W in Missouri and on other controlled access Federal-aid highway R/W in the State. Under the terms of the public-private partnership with Digital Teleport Inc., MoDOT allowed placement of the fiber optic cable on highway R/W in exchange for use of 6 of the 24 strands of the fiber optic cable as the backbone of MoDOT's ITS network. No investment of public money was required. In addition, the value of the fiber optic system has been recognized under the FHWA Innovative Finance program and a \$30 million soft match credit for use on future ITS projects. Originally, the fiber optic line was intended to be buried 20 to 30 feet from the edge of pavement. However, after installation was initiated, topography dictated the best location for the fiber optic cable was in the median. Access for maintenance purposes is only allowed from frontage roads or crossroads in accordance with current MoDOT policy. No access from the mainline is permitted.

Wireless: MoDOT issued RFP's in September, 1997 and again in the fall of 1998 which were intended to lead to a shared resources public-private partnership with the telecommunications industry to support deployment and operation of the Intelligent Transportation System in Missouri. MoDOT had planned to allow placement of wireless facilities where mutually acceptable sites are identified on MoDOT property in exchange for goods and services that support ITS deployment and operation. A few firms responded to each RFP and a potential telecommunications partner was identified each time, however, in both cases, negotiations were not successfully concluded because mutually acceptable terms could not be reached. MoDOT has also recognized additional potential conflicts with wireless facilities on the right-of-way during anticipated widening of major Interstate facilities in the future. At this time, MoDOT is not actively pursuing a wireless shared resources partnership.

NEBRASKA

FHWA Contact: Ed Kosola, (402) 437-5973 E-Mail: Edward.Kosola@fhwa.dot.gov

Fiber Optics: Lines have not been installed on Interstate R/W or on any other fully controlled access highway R/W in Nebraska, except for crossings.

Wireless: Facilities have not been installed on Interstate R/W or on any other fully controlled access highway R/W in Nebraska.

Western Resource Center:

COLORADO

FHWA Contact: Scott Sands, (303) 969-6703, ext 362 E-Mail: Scott.Sands@fhwa.dot.gov

Fiber Optics: Lines have been installed on Interstate highway R/W in your Colorado and on other controlled access Federal-aid highway R/W. The Colorado DOT received fibers for their own use as compensation. Installations were made in the R/W but are not considered to be a maintenance problem. The DO provided advice and encouragement.

Wireline/Wireless: Facilities have not been installed on any Interstate highway R/W in Colorado or on any other controlled access Federal-aid highway R/W in the State. A revised utility accommodation plan has been submitted to DO for approval that addresses the wireline and wireless telecommunication facilities.

MONTANA

FHWA Contact: Carl James, (406) 449-5302 ext. 237 E-Mail: Carl.James@fhwa.dot.gov

Fiber Optics: Lines have not been installed on any interstate highway right-of-way in Montana.

Wireless: Facilities have not been installed on any interstate R/W to date or on any other controlled access federal-aid facility. Comments The MDT has appointed a Task Force to fully evaluate the merits of utility occupancy, including pipelines, of the interstate R/W.

WYOMING

FHWA Contact: Galen Hesterberg. Wyoming Division, (307) 772-2012, ext. 45

E-Mail Address: Galen.Hesterberg@dot.fhwa.gov

WYDOT Contact: Dave Braden (307-777-4133) e-mail: dbryde@state.wy.us

Fiber Optics: Lines have not been installed on any Interstate highway R/W in Wyoming, but have been installed on other controlled access Federal-aid highway R/W. Compensation under consideration by WYDOT and State Business Council for future installations. WYDOT dictates locations and pushes all facilities to the outside limits of the R/W. Access for maintenance is typically from the highway, as the R/W is fenced. Where available, access for maintenance is recommended from outside the R/W through a locked gate. The DO has provided information, discussed pros/cons, and encouraged development of State policy to consistently respond to requests.

Wireless: Facilities have not been installed on any Interstate highway or any other controlled access Federal-aid highway R/W in the State. Very few requests have been received by WYDOT. Current requests have been denied due to concerns about tower and guy line locations and safety. WYDOT and State Business Council will review future requests for placement and compensation. The DO has provided information, discussed pros/cons, and encouraged development of State policy to consistently respond to requests.

NORTH DAKOTA

FHWA Contact: Rob Griffith, (701) 250-4349 E-Mail: Robert.Griffith@fhwa.dot.gov

Fiber Optics: Lines have not been installed on any Interstate highway right-of-way or any other Federal-aid highway right-of-way in the state.

Wireless: Facilities have not been installed on any Interstate highway right-of-way or on any other Federal-aid highway right-of-way in the State. The DO has been providing advice, and assistance. Comments: The North Dakota DOT had negotiated with AT&T for the installation of fiber-optic cabling. However, negotiations have failed, no additional services being proposed.

SOUTH DAKOTA

FHWA Contacts: Ken Erlenbusch (605) 224-7326, x3027; E-Mail: Ken.Erlenbusch@fhwa.dot.gov

Utilities - Ginger Maisie, (605) 224-7326, x3037;

ITS - Craig Gunslinger, (605) 224-7326, x3047.

Fiber Optics: The SDDOT has installed fiber-optic cable in the Interstate R/W. Other requests will be approved as they are received. The Governor mandated that the World Wide Web be made available to all schools (public and private) in South Dakota. This project has now been completed. All schools (elementary, Middle and High Schools, and Universities) have been wired with fiber-optic cable to provide Internet service to all schools. This required installing fiber-optic cabling on many miles of non-Interstate rights-of-way. The DO is providing advice and assistance.

Wireless: Facilities have not been installed on any Interstate highway right-of-way or on any other Federal-

aid highway right-of-way in the State

UTAH

FHWA Contact: Dan Pacheco. (801) 963-0078 x231 E-Mail: Dan.Pachecho@fhwa.dot.gov

UDOT - Orlando Jerez. Chief Utility/Railroad Engineer ojerez@dot.state.ut.us

4501 South 2700 West, Salt Lake City, Utah 84119-5996 Tel: (801) 965-4032 Fax: (801) 965-4338

Fiber Optics: Lines have not been installed on any Interstate highway or other highway in the State to date. A Governor's Task Force has presented a series of recommendations to the Legislature on what policy to follow to allow the State to benefit from the value of accommodating these lines. Regulations are being drafted to allow several options for charging, as the Legislature passed permissive legislation in April 1999.

Wireless: No activity to date. State utilities accommodation manual is on our web page located at <http://www.dot.state.ut.us/esd/Manuals/Utilitiesutilities.htm>

ARIZONA

FHWA Contact: Philip Bleyl (602) 379-3913 Email: phillip.bleyl@fhwa.dot.gov

Craig Stender, (602) 712-8865, Arizona DOT contact for Fiber Optics E-mail: cstender@dot.state.az.us

Dennis Barker, (602) 712-7230, is the Arizona DOT wireless contact E-Mail: dbarker@dot.state.az.us

Fiber Optics: Arizona issued a statewide RFP in July 1998. The RFP requested a communications firm(s) to provide communications infrastructure with the Department as a joint user. Two proposals were received. Both were reviewed by the Attorney General's Office for legal sufficiency. They rejected **one** proposal as non-responsive. The other is now being evaluated. It is expected that the Department will decide how to proceed by the end of the calendar year. To be considered responsive, proposals, at a minimum, had to include private ownership, operation, construction, and maintenance of communications infrastructure while providing the state with capacity and other enhancements in exchange for entrance into highway right-of-way. A fiber-optic communications network was preferred, but other systems would be considered. Much of the selection criteria are based on the number of statewide needs that would be met and on the quality and capacity to be provided. The type of system, capacity, equipment, and other enhancements provided to the state should first focus on the Department's need to expand ITS capabilities (a copy of the plan was made part of the RFP). The most effective proposal would be a plan for a statewide network. However, proposals for only one region or corridor would be considered. Additionally, ADOT made it clear that while it believed that only one proposer would be selected for any specific route, the Department reserved the right to select more than one proposer when it was in the best interest of the state to do so. The proposal also required an explanation of how other entities could be accommodated with in a single system. ADOT's purpose was to ensure competition was not inhibited, while providing the greatest benefit to the state.

Wireless: They currently have 8 providers under Master Lease Agreements. The Master Lease sets the basic terms, provisions and restrictions. Individual sites are leased under a separate site agreement which attaches to the Master Lease. New sites or collocations are requested by a provider and then advertised for competing bids. If no competing bids are received, which is usually the case, an Individual Site Agreement is executed. We currently have approximately 45 site agreements with some 15 pending.

CALIFORNIA

FHWA Contact: Bill Todd (916) 498-5011 E-Mail: William.Todd@fhwa.dot.gov

Caltrans Contact: Scott Atkins E-Mail Address Scott_Atkins@dot.ca.gov

(Fiber): Peter Schultze, (916) 654-2346 (Wireless) Bruce Wilson, (916) 654-4139

Fiber Optics: Lines have not been installed on Interstate highway R/W in California or on any other controlled access Federal-aid highway R/W, except by Caltrans for State purposes and in a few instances by others as an approved exception to the approved freeway utility accommodation policy. Approved exceptions for fiber-optics are now subject to Caltrans receiving compensation and excess capacity (conduits) - these conduits are then available to others (with compensation), The goal is to restrict

construction activities in the right of way. Legislative changes may be necessary to clarify authority to receive compensation.

Wireless: There are installations on Interstate R/W and on other controlled access Federal-aid highway R/W in accordance with Caltrans A Licensing Process and Siting Guidelines established for their Telecommunications (Wireless) Licensing Program. Compensation to Caltrans consists of cash based upon type of equipment and geographical location, ranging from \$10,980 to \$23,280 per site per year. Increases effective July 1, 2001 result in a new range from \$11,364-\$24,096. Guidelines have been established taking safety, functional, and aesthetic considerations into account. Access to wireless facilities is to be from outside the R/W. The DO has final review/approval authority over all wireless proposals on Federal-aid highways, including construction plans, environmental documents, collocation, and assignments. This and extensive related technical information is available through their website - <http://www.dot.ca.gov/wireless>

HAWAII

FHWA Contact: Laura Kong (808) 541-2700 ext. 328. E-Mail: Laura.Kong@fhwa.dot.gov

State Contact: Michael Amuro, HDOT, (808) 692-7332.

Fiber Optics: Lines have been installed at one Interstate location for the State's own use in traffic management purposes. The military has one installation on a state route that links the military bases through AT&T's HITS program. There is another private provider that traverses over 30 miles of State and city routes. This one installation sometimes runs longitudinal in the right-of-way and sometimes traverses the roadways.

Wireless: All installations are on Oahu and are at each of the tunnels located on H-3, SR-63, and SR-61. All active wireless providers are required to form a consortium that proposes a plan to coordinate installations. HDOT Right-of-way Branch reviews and approves plans. They then issue 4 individual annual leases to each provider. Lease fee charged is based on a fair market value of the wireless site plus a \$2,000 security deposit per site. The consortium constructs sites and maintains them. Each provider also pays a pro-rata share of the cost of any utilities used because they are tapping into HDOT's power source.

NEVADA

FHWA Contact: Jeff Weinman, (775) 687-5334. E-Mail: Jeff.Weinman@fhwa.dot.gov

State Contact: Heidi Mireles, NDOT, (775) 888-7840. E-Mail Address: HMireles@dot.state.nv.us

Fiber Optics: Three conduits have been installed, one of which contains a 100-fiber cable on Interstate (I-80) highway right-of-way in Nevada. It is within a 20-foot controlled access corridor between California and Utah known as the "Williams Project." A longitudinal, nonexclusive permit has been issued to multiple users for a minimal fee. Lateral lines are within secondary routes.

Wireless: NDOT is continuing to develop policy. Facilities have not been installed on any Interstate highway right-of-way. The FHWA Division Office will continue to provide advice to NDOT.

ALASKA

FHWA Contact Person: Aaron Weston, (907) 586-7427

E-Mail Address: Aaron.Weston@fhwa.dot.gov

Alaska has not yet had any experience with resource sharing activities

IDAHO

FHWA Contact Person: Cathy Satterfield (208) 334-9180 x125

E-Mail Address: Cathy.Satterfield@fhwa.dot.gov

Idaho has not yet had any experience with resource sharing activities

OREGON

FHWA Contact: John Gernhauser, (503) 587-4708. E-Mail: John.Gernhauser@fhwa.dot.gov

Fiber Optics: Oregon has accommodated fiber optics within Interstate right-of-way as an exception to its policy. ODOT is considering a policy on resource sharing. There was no compensation other than the normal administrative fee associated with the permit. Locations have been either traverse crossings under

the roadway or attached to structures.

Wireless: Facilities (towers, etc) have not been installed on Interstate or any other controlled access facilities in Oregon

WASHINGTON

FHWA Contact: Jim Leonard, (360) 753-9408. E-Mail: James.Leonard@fhwa.dot.gov

WSDOT Contacts: Al King, WSDOT, Operations Engineer and Light Lanes Project Director, (360) 705-7375.

E-Mail Address kinga@wsdot.wa.gov

Gerry Gallinger, Director of Real Estate Services, (360) 705-7305.

E-Mail Address galling@wsdot.wa.gov

Fiber Optics: The Seattle Project North Environmental document has been approved and an agreement executed. The project is moving forward. The I-5 South, 1-90 and 1-82 (East & West) environmental document is currently being worked on.

Wireless: WSDOT has a model airspace lease agreement that permits wireless on all highways if highway operations and safety are not compromised.

FOR CORRECTIONS OR ADDITIONS - CONTACT:

Janis Gramatins - Email: janis.gramatins@fhwa.dot.gov

FHWA Office of Real Estate Services

202-366-2030

or

Paul Scott - Email: paul.scott@fhwa.dot.gov

FHWA Office of Infrastructure

202-366-4104

 This page updated March 14, 2002

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United States Department of Transportation - Federal Highway Administration

**ATTACHMENT F- RESOLUTION ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND
PUBLIC LANDS, FEBRUARY 2002 WINTER MEETINGS IN WASHINGTON, D.C.**

**Resolution on Access to Public Rights-of-way and Public Lands.
February 2002 Winter Meetings in Washington. D.C.**

WHEREAS, Federal, State, and local governmental entities have a legitimate and important role in managing their rights-of-way and public lands; and

WHEREAS, Local government efforts to promote deployment of advanced services have been exceedingly valuable; and

WHEREAS, The rights-of-way practices of certain of these entities have emerged as a significant barrier to the deployment of advanced telecommunications and broadband networks since passage of the 1996 Act; and

WHEREAS, Prompt, nondiscriminatory access to public rights-of-way and public lands at reasonable rates, terms, and conditions is essential to the development of facilities-based competition, the deployment of state-of-the-art telecommunications services to the public and the implementation of facilities-based/broadband network redundancy to safeguard against network outages; and

WHEREAS, Most States do not have pro-access laws, and ambiguities in the laws of some of those states that do have such laws have undermined compliance; and

WHEREAS, Existing federal, State, and local laws have not prevented certain governmental entities from imposing unreasonable compensation and other concessions that have increased the cost, delayed, or prevented deployment of these critically needed facilities; and

WHEREAS, The failure of a governmental unit to provide prompt, non-discriminatory access to public rights-of-ways and public lands - free of unreasonable compensation or conditions, might pose an insurmountable barrier to entry to new carriers offering innovative facilities-based broadband and other services; now therefore be it

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its February 2002 Winter Meetings in Washington, D.C., encourages all governmental entities to act on applications for access to public rights-of-way in a reasonable and fixed period of time, to treat all providers uniformly and in a competitively neutral manner consistent with applicable federal and State law, to ensure that their control over access to public rights-of-way and public lands is used to facilitate, and not to create an unnecessary burden to, the deployment of telecommunications facilities in the form of increased costs or delays, and to consider the impact of setting compensation above actual and direct costs on the deployment of advanced telecommunications and broadband networks; and be it further

RESOLVED, That NARUC encourages municipalities and managers of public lands to provide prompt, non-discriminatory access to requesting carriers at reasonable rates and terms, consistent with environmental stewardship and other management responsibilities; and be it further

RESOLVED, That NARUC supports the vigorous enforcement of existing access laws by local governments, State Commissions, the FCC and other federal agencies, as well as the adoption of right-of-way access laws where none exist, and the review or reform of existing local, State and federal measures to ensure that rights-of-way access is eliminated as an actual or potential barrier to deployment; and be it further

RESOLVED, That the NARUC create a Study Committee on Public Rights of Way, to consist of members of the NARUC Telecommunications Committee, and the Telecommunications Staff Subcommittee and the Staff Subcommittee on Accounting and Finance, and be it further

RESOLVED, That the study committee is charged to develop recommendations for reducing the extent to which rights-of-way access serves as a barrier to the deployment of advanced telecommunications and broadband networks; and be it further

RESOLVED, That the committee shall invite participation by the industry and by groups representing agencies and governments that own public lands or offer public rights of way and other organizations representing governmental interests; and be it further

RESOLVED, That the committee shall report recommendations at the NARUC Summer meeting in 2002 at Portland, Oregon, for adoption by NARUC.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors February 13, 2002

**ATTACHMENT G - RESOLUTION ON RECOMMENDATIONS FOR PROMOTING
BROADBAND FACILITY ACCESS TO PUBLIC RIGHTS-OF-WAY AND PUBLIC LANDS
FOR 2002 NARUC SUMMER MEETING AT PORTLAND, OREGON**

**Resolution on Recommendations for Promoting Broadband Facility
Access to Public Rights-of-way and Public Lands**

WHEREAS, In February 2002, NARUC adopted a resolution encouraging all governmental entities to act on applications for access to public rights-of-way in a reasonable and fixed period of time, to treat all providers uniformly and in a competitively neutral manner consistent with applicable federal and State law, to ensure that their control over access to public rights-of-way and public lands is used to facilitate the deployment of telecommunications facilities; and

WHEREAS, That resolution also created a Study Committee on Public Rights-of-way and charged it with developing recommendations for reducing the extent to which rights-of-way access serves as a barrier to the deployment of advanced telecommunications and broadband networks; and

WHEREAS, The Study Committee invited and received participation by the industry and by groups representing agencies and governments that own public lands or offer public rights-of-way and other organizations representing governmental interests; and

WHEREAS, The Study Committee has produced a report that outlines several possible methods to address the competing interests involved; and

WHEREAS, The report of the Study Committee contains several views regarding the issues; now therefore be it

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2002 Summer meetings in Portland Oregon, offers its thanks to the Study Committee and **all** those that have submitted ideas and participated in the Rights-of-way project and without endorsing the report recommends that regulators, academia, units of government and all industry sectors carefully review the report of the Study Committee on Public Rights-of-way.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors July 31, 2002

ATTACHMENT H - §253

§253

(a) IN GENERAL. -- No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY.-- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. -- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION. -- If, after notice and public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates section (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

ATTACHMENT I - I-ROW'S Supplemental Views on the NARUC Study Group's Report on Rights-of-way

I-ROW'S Supplemental Views on the NARUC Study Group's Report on Rights-of-way

The members of I-ROW appreciate the opportunity to participate in this process and wish to commend the members of the NARUC study group on rights-of-way for their efforts. Their report will serve as a useful information source for those seeking to identify and resolve issues that impact deployment of competitive and broadband services.

I-ROW members, including competitive local providers, long distance carriers and incumbent local providers, agree that:

the actual and direct costs telecommunications providers impose upon the public rights-of-way constitute fair and reasonable amounts properly recoverable from telecommunications providers and

the majority of units of government do not impose unreasonable delays or fee structures that inhibit or prohibit the deployment of telecommunications infrastructure.

A problem does exist, however. I-ROW members continue to experience unreasonable delays or non-cost based fee structures in some locations. Sound public policy does not support such results. It is important to remember that fees for accessing public rights-of-way are passed on (often as line-item charges) to end-user customers. Further, delays in the deployment of networks deny service choices to customers, not only in the immediate community, but also in other communities that the planned network is intended to serve. Finally, case law establishes that local governments hold public rights-of-way in trust for the public and that appropriate compensation for use of public rights-of-way should be cost-based.

Many discussions at NARUC meetings and elsewhere have stressed the need for more rapid deployment of broadband capabilities and for lower prices for broadband services. However, it cannot be denied that fees for access to public rights-of-way that are above the actual and direct costs of managing the rights-of-way serve to increase consumers' costs for broadband offerings or that excessive delays in granting permits slows or prevents the deployment of broadband offerings.

Excessive fee structures (e.g. those based upon percentage of gross revenues) are inappropriate and unlawful. In the instances where non-cost based fees have been imposed on a carrier, those fees have had an adverse impact on broadband deployment. If the practice were to become more widespread, it would further exacerbate the negative impact on the deployment of new and innovative services that

consumers and government desire.

Finally, seven United States District Courts, the United States Court of Appeals for the Ninth Circuit and the Supreme Court *of* Iowa have held that, under section 253 of the Telecommunications Act of 1996, local governments may only charge fees that are “directly related to the carrier’s actual use of the local rights-of-way.” It should be noted that while some courts have held that municipalities are permitted to charge franchise fees that are not cost-based, those cases cannot be reconciled with economic reality in that they assume industry members and local governments negotiate at arms-length over the use *of* public rights-of-way, nor are those cases consistent with the legislative purpose behind section 253.

I-ROW’S ten recommended measures follow. Adoption of these recommendations would serve to advance the objectives *of* rapid and affordable competitive and broadband services.

**TELECOMMUNICATIONS
INDUSTRY RIGHTS-OF-WAY
WORKING GROUP**

Adelphia Business Solutions
ALTS
AT&T
BellSouth Telecommunications, Inc.
CompTel
espire Communications, Inc.
Global Crossing Ltd.
Level 3 Communications, LLC
Metromedia Fiber Network
Qwest
SBC
Sprint
Time Warner Telecom
Velocita
Verizon
Williams Communications, LLC
WorldCom

**RECOMMENDED MEASURES
TO PROMOTE PUBLIC RIGHTS-OF-WAY ACCESS**

- Access to public rights-of-way should be extended to all entities providing intrastate, interstate or international telecommunications or telecommunications services or deploying facilities to be used directly or indirectly in the provision of such services ("Providers").
- Government entities should act on a request for public rights-of-way access within a reasonable and fixed period of time from the date that the request for such access is submitted, or such request should be deemed approved.
 - Fees charged for public rights-of-way access should reflect only the actual and direct costs incurred in managing the public rights-of-way and the amount of public rights-of-way actually used by the Provider. In-kind contributions for access to public rights-of-way should not be allowed.
 - Consistent with the measures described herein and competitive neutrality, all Providers, including government owned networks, should be treated uniformly with respect to terms and conditions of access to public rights-of-way, including with respect to the application of cost-based fees.
- Entities that do not have physical facilities in, require access to, or actually use the public rights-of-way, such as resellers and lessees of network elements from facilities-based Providers, should not be subject to public rights-of-way management practices or fees.
- Rights-of-way authorizations containing terms, qualification procedures, or other requirements unrelated to the actual management of the public rights-of-way are inappropriate.
- Industry-based criteria should be used to guide the development of any engineering standards involving the placement of Provider facilities and equipment.
 - Waivers of the right to challenge the lawfulness of particular governmental requirements as a condition of receiving public rights-of-way access should be invalid. Providers should have the right to bring existing agreements, franchises, and permits into compliance with the law.
- Providers should have a private right of action to challenge public rights-of-way management practices and fees, even to the extent such practices and fees do not rise to the level of prohibiting the Provider from providing service.
- The Federal Communication Commission should vigorously enforce existing law and use expedited procedures for resolving preemption petitions involving access to public rights-of-way.

Rights-of-way: Local Governments' View

Introduction

Local Government' has been an active participant in the NAKUC "Rights-of-way" Study Group ("Study Group") effort from its inception. **An** unbiased effort to address the concerns of government and industry regarding rights-of-way could only be of benefit to Local Government and its constituents. Further, Local Government supports the development of broadband technologies **and** new communications services and feels a regulatory environment that favors competition is the best way to foster new growth and innovation. What Local Government does not support is growth and innovation at any cost.

Competition among telecommunications providers has brought more construction to streets, businesses, and neighborhoods than ever before. Simply encouraging the growth of broadband deployment in our neighborhoods cannot be the only goal of rights-of-way policy. Local Government needs to balance the interests of local taxpayers with those of local telecommunications users and address issues such as traffic congestion, public safety, repeated disruptions of PROW, costs of inspection of the PROW, and the wear and tear on our local streets. These issues are not merely nebulous regulatory issues; they present very real financial and physical challenges to local budgets and streets. Local Governments must manage construction in the PROW and bring order to what often is a scene of considerable chaos.

The Study paper fails to acknowledge these real local concerns in its call for a uniform nationwide access and fee structure. Such a national model which deprives Local Government of its "police powers" to protect the public health, welfare and safety while providing for "rent free" occupation of the rights-of-way are unworkable solutions. For that reason Local Government laments a missed opportunity to advance broadband deployment by NARUC and offers these supplemental views.'

I. The Study Fails to Demonstrate Local Government's actions are a barrier to entry

Telecommunications providers are pursuing entry strategies based on market factors, not local right-of-way policies and regulations. Furthermore, it is well past time for NARUC, the Federal Communications Commission and NTIA to state emphatically that state and local governments do not stand in the way of competition or of the deployment of broadband facilities. Our residential citizens hungry for broadband deployment and our commercial enterprises advance with the improvements resulting in price and speed that a competitive marketplace /or bandwidth provides. Therefore local governments seek to promote facilities-based competition through the efficient, fair management and pricing of public rights-of-way essential to a predictable, vigorous broadband market. Public rights-of-way should be neither a source of subsidy nor a barrier to advanced network. Local governments take seriously their duty to steward scarce public resources and to provide competitive access to local markets without damaging innocent third parties.

¹ These comments are offered on behalf of the National Association of Telecommunications Officers and Advisors (NATOA), the National League of Cities (NLC), the United States Conference of Mayors and the National Association of County Officials (NACO) hereinafter referred to as "Local Government."

'These supplemental views are in addition to the detailed edits Local Government offered during the Study Group process which may be found at www.natooa.org and the recently published "Right of Way Best Practices" manual crafted by the referenced four leading national associations of local officials at www.nlc.org

Evidence of local governments, pro deployment stance may be found in the cable industry's broadband deployment. Predominately regulated by local government, cable has either won or is winning the race to bring broadband to the home. If local government had been the bamer to deployment claimed by many of the carriers, one would have to wonder how according to the National Cable & Television Association the cable industry has been able to deploy broadband to over seventy million homes by December 31, 2001?³

II. Local Government has a protected property rights interest in the PROW.

National and state rights-of-way policy, even under the banner of promoting broadband deployment, must recognize the rights of local governments under the U.S. Constitution and the Telecommunications Act of 1996 ("1996 Act"). The Study Group's **report** has either failed or refused to recognize local governments' property interest, held either in fee or in trust, in the right-of-way which has recently been valued at over \$4 trillion dollars⁴.

The U.S. Constitution protects local governments' property rights in public rights-of-way.⁵ The Constitution also protects the federal form of government, reserving to states and local governments all powers not delegated to the United States, including all authority to manage use and disruption of local public rights-of-way.

- D) Section 253 of the Telecommunications Act of 1996 was crafted to balance the interests of federal, state, and local governments, and to preserve the local management of public rights-of-way. The 1996 Act recognized the rights of local

³ See http://www.ncta.com/industry_overview/indStat.htm

⁴ See TeleCommUnity Valuation tiled at the FCC and available on TeleCommUnity's homepage.

⁵ Case law substantiates that a franchise providing access to the right-of-way is an interest in real property. See *Group W Cable v. City of Santa Cruz*, 669 F. Supp. 954, 913 (N.D. Cal. 1987), citing *Cox Cable San Diego v. County of San Diego*, 185 Cal. App. 3d 368 (Cal. App. 4th Dist. 1986) ("a cable franchise grants a taxable possessory interest in real property. A cable operator's license to use the public thoroughfares bears such an indicia of a possessory interest as exclusiveness, durability, independence and private benefit.")

Further support for the proposition that a franchise is a real property interest is found in federal case law saying that franchise fees, which companies must pay for use of the right-of-way, are "in the nature of rent." As far back as 1823, the Supreme Court recognized that public utilities use rights-of-way in a way that is an "absolute, permanent and exclusive appropriation." *St. Louis v. Western Union Tel.*, 148 U.S. 92, 98-99, 13 S. Ct. 485, 487-88 (1893). The Court in *St. Louis* went on to explain this unique relationship, "who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental." *Id.*

More recently, the Fifth Circuit has recognized the leasehold-like nature of a cable franchise, "[f]ranchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of the public right-of-ways." *City of Dallas, Texas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997). See also *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 282 P.2d 36, 43 (Cal. 1955); *Erie Telecommunications v. Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). In *BellSouth Telecommunications, Inc., v. City of Orangeburg*, 337 S.C. 35, 522 S.E.2d 804 at § 1 (S.C. 1999), the court debunked the assumption that any payment that generates revenues for a local government must be a tax, even if it arises from a market transaction in which the payer receives valuable use of an asset in exchange for the payment. The *White Plains* decision, a New York federal district court decision in 2000, also spuke to the question of a telecommunications franchise fee based on gross revenues to reflect the market value of the local community's property. While *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000), held that burdensome application requirements plus a lengthy approval process could constitute a prohibition on entry triggering § 253(a), it also held that fair and reasonable compensation extends beyond mere costs. In fact the court upheld compensation requirements reflecting a gross revenues fee and a fixed annual fee.

governments to control and manage their rights-of-way and to obtain fair compensation for right-of-way use. The legislative history shows that Congress inserted § 253(c) specifically to preserve local authority over reasonable rights-of-way compensation and management, and drafted § 253(d) to ensure that the courts, and not federal agencies, have jurisdiction over § 253(c) issues.

- 2) Limiting local government right-of-way compensation to less than market value does not recognize the scarce and valuable nature of public-rights-of-way. Compensation should assure that the right-of-way is dedicated to its highest and best use and avoid wasteful consumption of this precious resource. The federal government does not give away either its spectrum or its federal lands at cost, but rather has crafted auction policies. For instance, spectrum, like right-of-way space, is a scarce resource that is most efficiently allocated through a market price mechanism. It is inconsistent for the federal government to auction spectrum at the highest possible price while at the same time assenting that local government property should be given away to telecommunications companies at below market compensation. If local governments are to protect their property interests, they must be free to seek appropriate efficient pricing mechanisms, including revenue-based measures, to establish such compensation.

III. Right-of-Way Management By Local Governments Is Necessary to Balance the Competing Demands Placed Upon Local Rights-of-way.

Local communities work with telecommunications providers and other rights-of-way users to resolve problems and make rights-of-way work efficient. When telecommunications providers refuse to cooperate, or ignore legitimate requirements, people get hurt and physical assets are **damaged**.⁶ Too often, providers fail to abide by local government standards of right-of-way management.

Subject to the police powers of local government, public rights-of-ways can be partially occupied by utilities and other service entities for facilities used in the delivery, conveyance, and transmission of services rendered for profit as such deployments may enhance the health, welfare, and general economic well-being of the community and its citizens. Every states' rights-of-way statute, including the Study Groups' recommended Michigan statute, includes specific language to preserve the police powers of local government to protect the health, welfare and economic well-being of the community. Local Government therefore would respectfully recommend to any legislature considering rights-of-way legislation to employ the following Purpose Section and authorizing clauses:

Purposes

The purpose of this legislation is
manage a limited resource to the long-term benefit of the public;
promote competition in the provision of telecommunications services and ensure that citizens have a wide variety of services available to them by establishing clear and consistent rules by which providers may occupy the public rights-of-way;
recover the costs of managing the public rights-of-way;
recover fair compensation for those parts **of** the public rights-of-way occupied by telecommunications and interactive computer service providers in their businesses;
prevent premature exhaustion of capacity in the public rights-of-way to accommodate communications and other services; and
minimize inconvenience to the public occasioned by the emplacement and maintenance of telecommunications and interactive computer service facilities in the public rights-of-way.

⁶ See NATOA's filing with NTIA, for an illustrative list of such right-of-way disasters.

Additionally the statute should include language such as the following taken directly from the Michigan Rights-of-way:

(*) This section shall not limit a municipality's right to review and approve a provider's access to and ongoing use of public right-of-way or limit the municipality's authority to ensure and protect the health, safety, and welfare of the public.'

(*) This section shall not limit the permitting agency's enforcement mechanisms included in a permit or authorizing ordinance, including the imposition of specific performance or impositions of times and interests.

(*) This section shall not limit the right of the permitting agency to require the provider to move or relocate facilities when such movement is required for the public's health, safety or welfare.

IV. Bankruptcy

The proposed statute is silent as to the treatment of the equipment of bankrupt telecommunications utilities. While until recently such a predicament was hard to imagine, recent events has proved the state and local government must address the potential challenge. For that reason, Local Government suggests the following language for consideration in the development of rights-of-way legislation:

BANKRUPTCY AND ABANDONMENT

Section ** Nothing in this act shall be construed as to limit the ability of a municipality to establish terms and conditions in a permit to address issues of equipment distribution and ownership in the event of bankruptcy or abandonment.

V. Fair and Reasonable Compensation is not limited to Costs

The Report and its model statute are flawed as they are founded on the erroneous belief that 47 U.S.C. Section 253 limits local government to the recovery of costs. Congress rejected the industry's lobby effort to limit fees to the recovery of costs and instead clarified in the only amendment to the act adopted on the floor of the House, that local government was authorized to manage its rights of way and require "fair and reasonable" for access to those rights-of-way.

The rationale behind the Congressional decision *to* preserve the ability of local government to charge rent to telecommunications providers for residing in local rights-of-way is simple. Local government as either the owner in fee of the rights-of-way, or holder of the property in trust for tax payers should not be forced to provide rent free access to such property.

Local Government, therefore, offers the following legislative language which represents a means to recover fair and reasonable compensation as provided under the Act.:

⁷ This section is verbatim from the Michigan legislation.

Just and Reasonable Fee Structure'

(I) The governing body of a city may assesses the following fees as just and reasonable compensation for the use of the public rights-of-way which includes the recovery for the taxpayers of the jurisdiction a payment for rent or other comoensation for the economic value of the property rights used within the rights-of-way.:

(a) An access line fee of up to a maximum of \$X.XX per month per access line, with an increase ~~of \$X.XX~~ every six (6) years thereafter; or

(b) An access line fee of up to X% ~~of~~ gross receipts.

(2) The permitting agency and the provider may reach mutual agreement on the value of fees in the form of in-kind facilities or services so long as the provision of such in-kind fees does not result in the fees exceeding the maximum amounts established in the act.

Conclusion and Additional Resources

Because of agreed to page limitations for the supplemental views of local government, our analysis and suggestions must stop at this point. A detailed commentary on the Study Report, including a red-lined model statute are available electronically from the homepage of the National Association of Telecommunications Officers and Advisors at www.natoa.org. Additionally, information and copies of Local Government's manual on best practices for rights-of-way management may be obtained from the National League of Cities at www.nlc.org.

⁸ This language comes from the recently enacted rights-of-way statute in Kansas.